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Seminole Tribe v. Florida: The Supreme Court's Botched Surgery of the Indian Gaming Regulatory Act;Legislative Reform

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I. INTRODUCTION

For many years now, Indian tribes have turned to casino gambling and other betting games to fund tribal activities.[1] In order to regulate Indian gaming activities, Congress enacted the Indian Gaming Regulatory Act (IGRA).[2] Before IGRA was enacted, the Supreme Court concluded in *California v. Cabazon Band of Mission Indians*[3] that the federal government controlled Indian gaming, and states could become involved in Indian gaming only when Congress expressly provided for state action.[4] Relying on the *Cabazon* holding, Congress subsequently enacted IGRA which specifically delegated more power to the states in connection to Indian gaming activities.[5]

Through IGRA, Congress achieved two worthy but competing goals. First, IGRA invited greater state participation in the Indian gaming regulatory process.[6] Second, IGRA safeguarded tribal interests by authorizing tribes to sue states in federal court when states fail to negotiate gaming compacts in good faith.[7] These two competing goals coexisted in a delicate balance because Congress allowed for greater state involvement but also provided a federal forum to remedy a potential abuse of state power against a tribe.[8]

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1. The federal government has allowed some Indian tribes to set up casinos in order to promote tribal economies. *See infra* note 15. Congress possesses the authority to regulate commerce with Indian tribes under the Commerce Clause of the Constitution. U.S. CONST. art. I, § 8, cl. 3; *see infra* note 38. Furthermore, the federal government has promised economic assistance to Indian tribes in both treaties and agreements. *See* discussion *infra* Part III.A.

2. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 (1994 & Supp. I 1997).

3. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

4. *Id.* at 207. The Supreme Court reasoned:

> "tribal sovereignty is dependent on, and subordinate to, only the Federal Government not the States," . . . . It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided.

Id. (citing Washington v. Confederated Tribes of Colvilles Indian Reservation, 447 U.S. 134, 154 (1980)).

5. *See* 25 U.S.C. §§ 2710(d)(1)(B) (1994 & Supp. I 1997) (allowing tribes to conduct Class III gaming, *see infra* note 20, only if such activity is permitted to any entity for any purpose by the state where the tribe is located); 25 U.S.C. §§ 2710(d)(1)(C) (permitting tribes to conduct Class III gaming only in accordance with a Tribal-State compact).

6. *See* 25 U.S.C. §§ 2710(d)(3) (1994 & Supp. I 1997) (discussing Tribal-State compacts).

7. 25 U.S.C. § 2710(d)(7)(A) (1994 & Supp. I 1997).

8. IGRA provides:

> The United States district courts shall have jurisdiction over —
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
> (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

Recently, the Supreme Court has disturbed IGRA's delicate balance in *Seminole Tribe v. Florida*.[9] In *Seminole*, the Supreme Court struck down as unconstitutional the provision which allowed tribes to sue states in federal court when states fail to negotiate gaming compacts in good faith.[10] As a result, Indian tribes are still subjected to state regulation but can no longer seek relief against a state or state official in federal court. Since the *Seminole* decision, a recent federal district court allowed a state IGRA suit against a tribal official.[11] Thus, federal courts have made Indian tribes more vulnerable than states to lawsuits under IGRA. As noted in part II of this Note, this result is clearly against Congressional intent.

In this Note, I argue that the Supreme Court should not have declared unconstitutional the IGRA provision which authorizes tribes to sue states in federal court. First, the Supreme Court ignored the legislative history of IGRA. Second, the Court failed to contemplate the history of tribal sovereignty. Finally, the Court overemphasized states' rights concerns and glossed over government functions and separation of powers considerations.

Part II of this Note discusses the legislative history of IGRA based on the Act's language and Congressional materials. Additionally, part II examines the status of Indian gaming before the enactment of IGRA and describes how IGRA was created to fine-tune this status. Part III of this Note shows that the delicate balance reached in IGRA would not have been disturbed if the Supreme Court had first applied a government functions test and then balanced states' rights and separation of powers concerns. Moreover, part III illustrates how the *Seminole* decision has disrupted the delicate balance created in IGRA. This part also describes the history of tribal sovereignty and shows how the Supreme Court has overestimated the strength of state sovereign immunity in light of Indian sovereignty. Part IV presents proposed changes to IGRA as well as possible judicial remedies to repair the damage caused by the Supreme Court in its *Seminole* decision.

II. LEGISLATIVE HISTORY

IGRA established a comprehensive system of checks and balances among tribes, states, and the federal government. Congress desired to preserve tribal sovereignty, to include the states, and to make the relationship between the three governments more predictable.[12] Congress specifically intended to prevent courts from balancing these interests on their own.[13] IGRA balanced these interests and assigned distinct roles to the tribal, state, and federal players. Since Congress had already considered states' rights in the equation, the *Seminole* Court's withdrawal of a provision for the sake of states' rights has upset the delicate balance.

Indian gaming strikes at the core of basic federalism concerns of states' rights and federal rule. IGRA does not ignore or eliminate state interests.[14] In enacting

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25 U.S.C. § 2710(d)(7)(A) (1994 & Supp. I 1997).

9. Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

10. *Id.* at 1131-32.

11. *See* Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, 63 F.3d 1030, 1051 (11th Cir. 1995).

12. S. REP. NO. 100-446, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076.

13. *Id.*

14. IGRA provides:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a

IGRA, Congress favored tribal and federal interests over state interests.[15] Congress wanted to preserve a long tradition of tribal sovereignty.[16] During the creation of IGRA, the states expressed concern that Indian gaming would be infiltrated by organized crime and thus required protection through federal and state regulation.[17] However, the Senate Select Committee on Indian Affairs reported that there had been not one proven incident of organized crime in the fifteen years of Indian gaming prior to IGRA.[18] Congress also recognized ulterior motives: states did not want Indian casinos to compete with state-run lotteries and private casinos.[19]

The purpose of IGRA is clearly set out in the Act's language. Substantive provisions of IGRA encompass a categorical approach to gaming regulation. IGRA separates Indian gaming into three classes with different degrees of regulation.[20] The Act designates who maintains authority over particular types of Indian gaming and what remedies are available to the parties involved. As part of the larger regulatory scheme, IGRA allows tribes to sue states in federal court if they do not negotiate certain gaming compacts (Class III) in good faith.[21]

Indian tribes believed that IGRA was a compromise: states were allowed some involvement in the regulation process, and in exchange, tribes were able to sue states

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State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701(5) (1994 & Supp. I 1997).

15. IGRA states:

> The purpose of this Act is —
> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702 (1994 & Supp. I 1997).

16. S. REP. NO. 100-446, at 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071-72. The Senate Report notes that "the issue has been how best to preserve the right of tribes to self-government." *Id.*

17. S. REP. NO. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075.

18. *Id.*

19. S. REP. NO. 100-446, at 33 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3103.

20. The Senate Report to IGRA summarized the Congressional classification of Indian gaming as follows:

> *Class I (ceremonial gaming).* — Traditional gaming remains within the exclusive jurisdiction of Indian tribes and outside the scope of the Act.
> *Class II (bingo, lotto, pull tabs, tip jars, punch boards and card games, with the specific exclusion of banking card games such as chemin de fer, baccarat and blackjack).* — Class II continues to be within tribal jurisdiction but will be subject to oversight regulation by the National Indian Gaming Commission; care [sic] games must be played under state-mandated hour and pot limits, if any.
> *Class III (all gaming that is not class I or class II, i.e., banking cards, all slot machines, casinos, horse and dog racing, jai-alai).* — Tribes may engage in class III gaming if they enter into tribal-State compacts for the operation of tribal class III games.

S. REP. NO. 100-446, at 7 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3077.

21. 25 U.S.C. § 2710(d)(7)(A) (1994). For a description of Class III gaming compacts, see *supra* note 20.

in federal court when states did not comply with the process.[22] Tribes continue to believe that they possess the sovereign right to conduct gaming on their reservations. And through IGRA, Congress had persuaded tribes to compromise. By accepting gaming rules and regulations, tribes would be protected against state interference.[23] In fact, tribes indicated that an outright federal prohibition of certain kinds of gaming was a more attractive alternative than state regulation.[24] Legislative proposals to revise IGRA and court decisions have attempted to give states more control over Indian gaming and have ignored the pro-Indian purposes behind IGRA.

Congress enacted IGRA in response to the *California v. Cabazon Band of Mission Indians* decision.[25] The Supreme Court found that Indian gaming fell under the control of the federal government, and states could only become involved when Congress expressly provided for state action.[26] In *Cabazon*, the Court reasoned that a state's fear of organized crime infiltration was not enough to trample tribal sovereignty.[27] IGRA was passed in the wake of *Cabazon* to give only a limited participatory role to the states. The *Cabazon* decision established that the federal government could continue to maintain authority over Indian gaming regulation.[28] In no way was IGRA meant to change the federal stronghold over this regulation. Although IGRA brought the states into the process, the Act carefully restricted the states' role by making them amenable to suit in federal court.[29]

III. THE *SEMINOLE* DECISION'S DISRUPTION OF THE IGRA BALANCE

A. History of Tribal Sovereignty

In the earlier days of treaties and in the present days of legislation, the federal government has considered tribal sovereignty a critical factor in its decision-making process. For example, Congress recognized a long tradition of tribal sovereignty when it enacted IGRA.[30] In addition, the Supreme Court noted in *Cabazon* that it had "consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory.'"[31] The legislative, executive, and judicial branches of

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22. Telephone Interview with Karen J. Funk, Legislative Specialist at Hobbs, Straus, Dean & Walker (a law firm specializing in American Indian matters) (Sept. 20, 1995).

23. *Id.*

24. The Senate Report notes:

> Tribes generally opposed any effort by the Congress to unilaterally confer jurisdiction over gaming activities on Indian lands to States and voiced a preference for an outright ban of class III games to any direct grant of jurisdiction to States.

S. REP. NO. 100-446, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3074.

25. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

26. *Id.* at 207.

27. *Id.* at 221-22. The Supreme Court held:

> We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club.

Id.

28. *Id.* at 207.

29. 25 U.S.C. §§ 2701-21 (1994 & Supp. I 1997).

30. *See* S. REP. NO. 100-446, at 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071-72.

31. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987) (citing United States v. Mazurie, 419 U.S. 544, 557 (1975)).

the federal government have supported Indian programs in order to preserve and encourage tribal sovereignty.

Tribal sovereignty is evidenced today in tribal schools, tribal health clinics, and tribal courts. Tribal sovereignty is distinguishable from state sovereignty. For instance, federal legislation that creates and funds tribal governmental activities stems from treaties between the federal government and the Indian tribes. Felix S. Cohen, an Indian law expert who has traced Indian law back to the historical days of treaties, compared Indian tribes with foreign nations when he noted that "treaties with Indian tribes are of the same dignity as treaties with foreign nations[,] a view which has been repeatedly confirmed by the federal courts and never successfully challenged."[32] Cohen concluded that "numerous treaty provisions establish [tribes'] status as dependent nations."[33] Payment and services to tribes are promised consideration in treaties and agreements. For example, in exchange for land the federal government promised compensation and services to Indian tribes.[34] The federal government should seek to protect Indian gaming from state interference because the federal government has made treaty and now legislative promises to Indian tribes to help them obtain economic self-sufficiency.

B. *Seminole Tribe v. Florida*: The Supreme Court's Botched Surgery of the Indian Gaming Regulatory Act

The Supreme Court attacked the delicate balance created in IGRA. In March of 1996, the Court in *Seminole Tribe v. Florida*[35] declared that the IGRA provision which allowed for tribes to sue states in federal courts was unconstitutional because it violated states' Eleventh Amendment[36] sovereign immunity.[37] In response to the Seminole Tribe's attempts to sue the State of Florida for failing to negotiate a gaming compact in good faith, the Supreme Court asserted that Congress did not have the power to draft such a provision because it did not possess the authority to abrogate state sovereign immunity under the Commerce Clause.[38]

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32. FELIX X. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 33-34 & n.4 (Five Rings Corp. 1986) (citing Holden v. Joy, 17 Will. 211, 242-43 (1872); Worcester v. Georgia, 6 Pet. 515, 559 (1832); Turner v. American Baptist Missionary Union, 24 F. Cas. 344 (C.C.D. Mich. 1852) (No. 14,251)).

33. *Id.* at 40 (citation omitted).

34. *Id.* at 44.

35. *Id.*

36. U.S. CONST. amend. XI. This Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Id.

37. *Seminole*, 116 S. Ct. at 1131-32. Sovereign immunity is defined as the following:

> A judicial doctrine which precludes bringing suit against the government without its consent. Founded on the ancient principle that "the King can do no wrong," it bars holding the government or its political subdivisions liable for the torts of its officers or agents unless such immunity is expressly waived by statute or by necessary inference from legislative enactment.

BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

38. *Seminole*, 116 S. Ct. at 1131-32. In its holding, the Court overruled the *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1989), plurality which found that Congress possessed the authority to abrogate state sovereign immunity when it enacted legislation pursuant to the Interstate Commerce Clause. Essentially, the Interstate Commerce Clause and the Indian Commerce Clause are found in the same part of the Constitution, but courts and legislators use their specific names when referring to them in their particular contexts. The Commerce Clause of the Constitution states that Congress shall

Pursuant to the Commerce Clause, the federal government has exclusive authority over the regulation of Indian gaming.[39] Since *Seminole* took away a state limit but left the tribal limits in place in IGRA, the Court contravened directly against Congressional intent to balance state and tribal interests.

Three critical factors have emerged in courts' analyses of state sovereign immunity: 1) federalism, 2) separation of powers, and 3) government functions. Additionally, the case law concerning state sovereign immunity has also played a role in how courts decide whether to apply the doctrine.[40] The focus on federalism advanced by the Supreme Court in *Seminole's* majority was appropriate because the Supreme Court preserves states' rights, particularly those constitutionally-proscribed, such as the Eleventh Amendment. However, the *Seminole* majority should have addressed government functions and separation of powers concerns as alluded to in the *Seminole* dissents.[41] The historical underpinnings of the Eleventh Amendment and sovereign immunity as discussed in case law show that the Court should first apply the relevant government function tests and then proceed to balance out separation of powers and federalism concerns.[42]

1. Federalism

The provision in IGRA which authorizes tribes to sue states in federal court implicates Constitutional provisions that cause tension between a supreme national government and states. First, under the Commerce Clause, the Constitution has authorized Congress to regulate commerce with Indian tribes.[43] Second, under the Eleventh Amendment, the Constitution has provided for state government immunity from suit in particular circumstances.[44] Third, under Article III, the Constitution has given Congress some discretion in expanding the scope of federal court jurisdiction.[45] By overemphasizing the Eleventh Amendment protection of states, the Supreme Court underemphasized the importance of a supreme national government.

When the Supreme Court in *Seminole* held that Congress could only abrogate state sovereign immunity when it enacts legislation pursuant to the Fourteenth Amendment,[46] the Court neglected to consider the scope of Congress' ability to abrogate state sovereign immunity under federal court jurisdiction. Under federal court jurisdiction, Congress may authorize appellate review in the Supreme Court and lower federal

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have the power "[t]o regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

39. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987). *See also supra* note 24 (discussing how Indian tribes recognized that the federal government could ban Indian gaming as well as determine the scope of state participation in the regulation of Indian gaming).

40. *See infra* Part III.B.1.

41. Justice Stevens alluded to separation of powers concerns when he argued that the majority's approach ends exclusive federal control over such areas as bankruptcy. *Seminole*, 116 S. Ct. at 1134 (Stevens, J., dissenting). *See infra* Part III.B.2. Justice Souter addressed government functions concerns when he distinguished prospective relief from retrospective relief in his *Ex parte Young* discussion. *Seminole*, 116 S. Ct. at 1178-81 (Souter, J., dissenting). *See infra* Part III.B.3.c.

42. *See infra* Part III.B.2.

43. U.S. CONST. art. I, § 8, cl. 3. *See supra* note 38 and accompanying text.

44. U.S. CONST. amend. XI. *See supra* note 36 and accompanying text.

45. U.S. CONST. art. III, § 2, cl. 2. This clause states that in cases in which the Supreme Court does not have original jurisdiction, "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.*

46. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1131-32 (1996).

courts.[47] This Constitutional grant does not eliminate state sovereign immunity.

Examining the structure of the government created by the Constitution, Alexander Hamilton made several assertions which support the supremacy of the national government. First, he rationalized that lower federal courts were necessary so that state courts would not determine "matters of national jurisdiction."[48] Second, Hamilton maintained that the United States Supreme Court had original jurisdiction where a state shall be a party in order to preserve the public peace.[49] Third, Hamilton reasoned that "[t]he evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union."[50] Finally, Hamilton noted that the national legislature possessed the authority to expressly prohibit state jurisdiction.[51] Hamilton's assessment of the Constitution and the United States government structure envisioned a narrow scope for state sovereign immunity to protect states' rights.

Justice Brennan developed a diversity theory interpretation of the Eleventh Amendment in his dissent in *Atascadero State Hosp. v. Scanlon*.[52] First, he argued that since the Eleventh Amendment tracked Article III language, the Amendment was only meant to restrict jurisdiction based on party status.[53] Second, Brennan suggested that the Eleventh Amendment was created amidst the assumption that noncitizens and aliens would sue states in federal court when states defaulted on their Revolutionary War debts.[54] Third, Brennan found that the diversity theory approach to reading the Eleventh Amendment had a historical basis in the ratification debates because both Federalists and anti-Federalists believed that the Constitution abrogated state sovereign immunity.[55] Finally, Justice Brennan concluded that Justice Marshall's perception of the Eleventh Amendment in several cases paralleled Brennan's perception, because Justice Marshall understood that "neither Article III nor the Eleventh Amendment limits the ability of the federal courts to hear the full range of cases arising under federal law."[56] Justice Brennan's diversity jurisdiction interpretation of the Eleventh Amendment and the history and case law which support his interpretation demonstrate that the protection of states' rights has not been the sole consideration underlying the Eleventh Amendment.

The history surrounding the enactment of the Eleventh Amendment illustrates

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47. U.S. CONST. art. III, § 2, cl. 2.

48. THE FEDERALIST NO. 81, at 546 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

49. *Id.* at 548.

50. THE FEDERALIST NO. 82, at 556 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

51. *Id.* at 555-57.

52. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 301 (1985) (Brennan, J., dissenting). In this case, an applicant for employment sued a state hospital for violating the Rehabilitation Act of 1973. *Id.* at 236. The Supreme Court conceded that Congress possessed the authority to abrogate Eleventh Amendment state sovereign immunity when it acted pursuant to section five of the Fourteenth Amendment. *Id.* at 238. However, the Court held that Congress failed to abrogate state sovereign immunity because Congress did not clearly express this intent in the piece of legislation in question. *Id.* at 247. Section five of the Fourteenth Amendment provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

53. *Atascadero*, 473 U.S. at 286-87.

54. *Id.* at 262.

55. *Id.* at 278-79.

56. *Id.* at 298. *See generally* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Osborn v. President of the Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); United States v. Peters, 9 U.S. (5 Cranch) 115 (1809); Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

that it was never considered a complete protection for states' rights. In *Chisholm v. Georgia*,[57] Justice Blair pointed to the language of Article III and reasoned:

> our Con[s]titution mo[s]t certainly contemplates . . . the maintaining [of] a juri[s]diction again[s]t a State, as [a] Defendant[,] . . . a State, by adopting the Con[s]titution, has agreed to be amenable to the judicial power of the *United States*, [s]he has, in that re[s]pect, given up her right of [s]overeignty.[58]

Focusing on how feudal sovereignties and governments founded on compacts are different, Chief Justice Jay also relied on Article III's language but further reasoned that feudal sovereignties in England and Europe were different from the popular sovereignty in the United States because the former rested in the Prince or King and the latter rested in the people.[59] In addition to the plain language argument of Article III and the government structure argument, which each support a narrow view of sovereign immunity, the history of the time period supported such a reading. Judge Gibbons looked at the *Chisholm* decision within the historical context of the Peace Treaty of 1783 and concluded that "treaty rights of the British creditors" and "the holders of property" required federal court jurisdiction for effective enforcement.[60]

Clearly, the Eleventh Amendment was enacted in response to *Chisholm*. The Supreme Court in *Hans v. Louisiana*[61] noted that *Chisholm* "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed."[62] Justice Souter's *Seminole* dissent noted that the shock theory regarding the adoption of the Eleventh Amendment was questionable because "Congress was in session when *Chisholm* was decided, and a constitutional amendment in response was proposed two days later, but Congress never acted on it, and in fact it was not until two years after *Chisholm* was handed down that an amendment was ratified."[63] The Supreme Court failed to look at all the history surrounding the Eleventh Amendment when it narrowed its concerns to the protection of states' rights.

Another argument for a narrow reading of the Eleventh Amendment's protection of state governments is that the concern of an encroaching federal government has been ignored in the context of suits against local governments. As illustrated in *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*,[64] the Supreme Court has upheld the notion that local governments are amenable to suits in federal courts.[65] This history suggests that the *Seminole* majority overestimated how much federal court jurisdiction would encroach upon states' rights. The majority's decision to restrict Congress' ability to expand federal court jurisdiction is discussed in the next section.

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57. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
58. *Id.* at 451, 452.
59. *Id.* at 471-72.
60. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1923 (1983).
61. Hans v. Louisiana, 134 U.S. 1 (1890).
62. *Id.* at 11.
63. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1149 n.5 (1996) (Souter, J., dissenting).
64. Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).
65. *Id.* at 280-81.

2. Separation of Powers

The Supreme Court unconstitutionally entered into a legislative role when it rewrote the IGRA provision drafted by Congress specifically to address tribal sovereignty. The Court should have assessed general separation of powers considerations in its determination of state sovereign immunity. Indeed, the Constitution requires separation of legislative powers in a congressional body and adjudicative powers in a judicial body.[66]

Many acts of Congress "authorize judicial review [when] a private person . . . wishes to take the initiative in challenging official action."[67] For example, the National Labor Relations Act specifies that "[a]ny person aggrieved by a final order of the [National Labor Relations Board] . . . may obtain a review of such order in any [appropriate] United States court of appeals."[68] The Administrative Procedure Act (APA)[69] provides "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[70] The above provisions reflect Congress' attempt to balance the power of the judiciary against the power of the executive in implementing legislative programs and policies.

The *Seminole* majority failed to take into account separation of powers in its discussion of the strength of state sovereign immunity. In terms of the structure of the Constitution, the *Seminole* majority suggested that Congress could not bypass the constitutional limits placed upon federal jurisdiction.[71] In its analysis of the relationship between Congress and federal court jurisdiction, the majority projected the notion that Congress' ability to expand federal court jurisdiction was severely limited by Article III.[72] The majority further cautioned that the powers of Congress could not be used to expand the jurisdiction of the federal courts. In asserting that the Tribe's suit should be dismissed for lack of federal court jurisdiction, the majority reasoned, "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[73] The Court overlooked that although Article III defines the scope of judicial power, it also gives Congress the authority to expand federal court jurisdiction.[74]

Although the majority downplayed the power of Congress to expand federal court jurisdiction, the majority pointed to the power of Congress to create alternative and thus more appropriate remedies, and asserted that the *Ex parte Young* doctrine

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66. *See* U.S. CONST. art. I, § 1; U.S. CONST. art. III, § 1.

67. RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 999-1000 (4th ed. 1996).

68. 29 U.S.C. § 160(f) (1994 & Supp. I 1997).

69. 5 U.S.C. §§ 701-06 (1994 & Supp. I 1997).

70. 5 U.S.C. § 702 (1994 & Supp. I 1997).

71. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1131-32 (1996).

72. *Id.* at 1127-28 (1996). *See* Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 97-98 (1984) (stating that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III"). *See also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 39 (1988) (recognizing that Congress, under Article I, expanding the scope of the federal court's jurisdiction under Article III "contradict[s] our unvarying approach to Article III as setting forth the exclusive catalog of permissible federal court jurisdiction"), *overruled by* Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

73. *Seminole*, 116 S. Ct. at 1131-32.

74. U.S. CONST. art. III, § 2, cl. 2.

(that government officials cannot hide from suit due to their official status)[75] could not be applied in this case. The majority found that "[t]he narrow exception to the Eleventh Amendment provided by the *Ex parte Young* doctrine cannot be used to enforce § 2710(d)(3) because Congress enacted a remedial scheme, § 2710(d)(7), specifically designed for the enforcement of that right."[76] This finding is inconsistent because the majority concluded that the alternative scheme was unconstitutional.[77]

Justice Stevens believed that the *Seminole* case was about the power of Congress and acknowledged that even Justice Iredell[78] recognized this power.[79] In addition, Justice Stevens asserted that the majority's approach "prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy."[80] Although federal courts have the authority to make sure Congress does not violate the Constitution and give federal courts more jurisdiction than is allowed under Article III, the Supreme Court neglected to remember that Congress, not the Supreme Court, has the power to define the scope of federal court jurisdiction. Because the Supreme Court overstepped its constitutional role in *Seminole*, the Court essentially made an attempt to legislate and thereby violated the principle of separation of powers.

3. Government Functions

A government functions inquiry has proposed the following question: *will the cause of action in question prevent the government from performing its functions?* Sovereign immunity is an ancient doctrine established to prevent the incapacitation of government. Different factors affect this consideration, such as who is sued and what type of remedy is sought. If the Supreme Court asked the above question in *Seminole*, it would have concluded that the suit against Florida was permissible. In the context of regulating Indian gaming, a lawsuit to ensure fairness between a state and a tribe in the negotiation process does not hinder government functions.

a. Type of Conduct by the Official

The concept of official responsibility is evident in sovereign immunity analysis and the historical context of suits against government officials. In *Little v. Barreme*,[81] a case involving a federal official who engaged in a trespass unauthorized by federal law, the Supreme Court ruled that federal officials could not shield themselves from consequences of illegal conduct such as common law trespass.[82] This finding suggests that government officials should still be held accountable for their actions.

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75. *See* discussion *infra* Part III.B.3.c.

76. *Seminole*, 116 S. Ct. at 1133.

77. *Id.* at 1131-32. The alternative scheme was the provision that allowed tribes to sue states in federal courts.

78. Justice Iredell dissented in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *See supra* Part III.B.1 (discussing how the Eleventh Amendment was enacted in response to *Chisholm*).

79. *Seminole*, 116 S. Ct. at 1133.

80. *Id.* at 1134 n.1. Thus, according to the *Seminole* Majority, cases such as *In re Merchants Grain, Inc.*, 59 F.3d 630 (7th Cir. 1995) (holding that the Eleventh Amendment does not bar a bankruptcy court from issuing a money judgment against a State under the Bankruptcy Code), must be wrong.

81. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

82. *Id.* at 179.

Another distinction in the sovereign immunity analysis is whether the scope of this immunity not only extends to sovereigns and individuals who act in their official capacity for the sovereigns but also applies to officials of the sovereigns who act in their individual capacities. In *United States v. Lee*,[83] the heirs of the Lee estate, which was illegally taken by the federal government, sued the government agents who held the land.[84] The Supreme Court held that a government official could be sued in his official capacity for injunctive relief because "[a]ll officers of the government . . . are creatures of the law, and are bound to obey it."[85] The *Lee* decision demonstrates that courts should consider whether the halt of an official's conduct infringes upon the effective administration of the government or simply assures that the official complies with the law.

b. Form of Relief Sought

In deciphering between a suit against the sovereign and a suit against the officers, courts have focused on whether such an action interferes with public administration and whether such a suit dips into the public treasury. In *Pennhurst State School & Hospital v. Halderman*,[86] the Supreme Court stated that the issue was whether the relief sought had "an impact directly on the State itself."[87] The case dealt with the conditions of care for the mentally retarded at a state institution.[88] The Court concluded that the form of relief sought, increased funds for and support of a state institution, made the case one against the state.[89] The Court held that sovereign immunity barred suit against the state institution and state officials based on state law.[90] However, the Court conceded that relief could be granted to the respondents under federal law.[91] Therefore, courts should permit suits which are initiated to bring states into compliance with federal law.

The Supreme Court has established discrepancies based on the form of relief sought in determining whether suits against officers in their official capacity would be prevented by sovereign immunity. These discrepancies have lent further support for a court to consider the effects on government functions before it determines whether to uphold sovereign immunity. In *Land v. Dollar*,[92] the Supreme Court held that a plaintiff's right "under general law to recover possession of specific property wrongfully withheld" may be enforced against an official and that official cannot plead the sovereign's immunity against the court's power to afford a remedy.[93] Since the Court distinguished between the type of relief sought and the type of conduct an official was engaged in and then determined whether a suit is against an official or the sovereign, the Court intended to preserve certain causes of action against government officials.

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83. United States v. Lee, 106 U.S. 196 (1882).
84. *Id.* at 205.
85. *Id.* at 220.
86. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984).
87. *Id.* at 117.
88. *Id.* at 92.
89. *Id.* at 124.
90. *Id.* at 124-25.
91. *Id.* at 125.
92. Land v. Dollar, 330 U.S. 731 (1946).
93. *Id.* at 736.

Another discrepancy the Court has proposed in its Eleventh Amendment argument has been to focus on whether the relief sought was prospective or retrospective. In *Miliken v. Bradley*,[94] the Supreme Court found the federal district court decree which ordered the state to pay half the cost of desegregation programs was acceptable because the remedy was a prospective-compliance remedy.[95] The Court asserted "[t]hat the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system."[96] Because the Supreme Court distinguished prospective relief from retrospective relief, the Court has provided support for Justice Souter's acceptance of an *Ex parte Young* remedy in *Seminole*, as discussed in the following section.

c. Ex parte Young

The ruling in *Ex parte Young*[97] provided that government officials should not be able to hide from suit because of their official status.[98] The Court ruled that one can sue a state official in federal court for alleged unconstitutional conduct and get an injunction against the official even though one would not be able to sue the state itself.[99] The Court's acceptance of the premise that officers cannot bypass liability solely based on their "officer" status illustrated that the Court did not interpret sovereign immunity as an absolute immunity.

The Supreme Court's allowance of broad state powers in *Seminole* is inconsistent with *Ex parte Young's* limitations on broad state powers. By not adhering to *Ex parte Young's* limitations, *Seminole* has placed Indian tribes at an unconstitutional disadvantage.[100]

The federal court ruling in *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*[101] that a tribal official was amenable to suit under *Ex parte Young* in accordance with IGRA[102] suggests that a state official should be amenable to an *Ex parte Young* suit in accordance with IGRA as well.[103] The *Tamiami* case involved a

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94. Miliken v. Bradley, 433 U.S. 267 (1977).
95. *Id.* at 289.
96. *Id.* at 290 (emphasis added).
97. Ex parte Young, 209 U.S. 123 (1908).
98. *Id.* at 159-60.
99. *Id.*
100. The Supreme Court has disenfranchised Indian tribal sovereignty in other instances. On June 23, 1997, the Supreme Court concluded that the Coeur d'Alene Tribe did not have an *Ex parte Young* remedy against state officials who were acting on land which the Tribe claimed title to in accordance with federal law. Idaho v. Coeur d'Alene, 117 S. Ct. 2028, 2043 (1997). The Supreme Court held that Indian tribes did not have an *Ex parte Young* remedy against state officials in a quiet title action. *Id.* Nonetheless, the courts have not protected Indian tribal officials from suit.
101. Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, 63 F.3d 1030 (11th Cir. 1995).
102. *Ex parte Young* has proposed:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Ex Parte Young, 209 U.S. at 159-60.
103. *Tamiami Partners*, 63 F.3d at 1051.

gaming management company suing tribal officials under IGRA to compel the tribal officials to arbitrate a dispute.[104] When a state official or tribal official violates the Constitution, the official no longer acts on behalf of the state or the tribe and thus should be amenable to suit for violating federal law and should not be protected by sovereign immunity. As it stands now, an *Ex parte Young* remedy can be sought against a tribal official but cannot be maintained against a state official under the same legislation (IGRA). Therefore, states are given special treatment compared to Indian tribes, a conclusion clearly unfair to the Indian tribes.

The Seminole Tribe invoked *Ex parte Young* on the theory that state officials can be sued for violating the Constitution. The *Seminole* majority held that the doctrine of *Ex parte Young* could not be applied because Congress had constructed an alternative remedy.[105] Since the IGRA tribal remedy against the state was deemed unconstitutional, the majority's argument that Congress created an alternative remedy so the Tribe did not need *Ex parte Young* was inconsistent.[106]

Justice Souter noted that only one limit on *Ex parte Young* has ever been acknowledged by the Supreme Court:

> Indeed, in the years since *Young* was decided, the Court has recognized only one limitation on the scope of its doctrine: under *Edelman v. Jordan*, 415 U.S. 615, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), *Young* permits prospective relief only and may not be applied to authorize suits for retrospective monetary relief.[107]

Souter acknowledged the importance of *Ex parte Young* in the structure of the United States' government.[108] Since the Tribe did not seek retrospective relief, Souter concluded that the Tribe could recover under *Ex parte Young*.[109] Therefore, the *Seminole* majority's denial of an *Ex parte Young* remedy against a state official under IGRA conflicts with the history of the doctrine.

4. Case Law Support

Although *Seminole* overruled the *Union Gas*[110] plurality, the Supreme Court should not ignore its Commerce Clause jurisprudence articulated in that decision.[111] Since the federal government's authority to regulate Indian gaming stems from the Commerce Clause, courts should not ignore Commerce Clause precedents when they decide the strength of Congress' authority to regulate Indian gaming. For instance, in

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104. *Id.* at 1040.

105. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1133 (1996). The alternative remedy was the provision that allowed tribes to sue states in federal courts.

106. The majority argued that Congress did not intend to allow for suit against a state official. *Id.* Thus, the Tribe could not subject the governor to suit because of the lack of Congressional intent. The majority failed to address whether compelling a governor to negotiate with a tribe in good faith affected whether a government could properly function or not.

107. *Id.* at 1178.

108. *Id.* at 1180.

109. *Id.* at 1181.

110. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), *overruled by* Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

111. In the *Union Gas* plurality, the Court held that a state could be sued in federal court for violating an environmental protection statute. *Id.* at 23. The Court reaffirmed that Congress has the authority to override state sovereign immunity when it legislates pursuant to the Commerce Clause. *Id.* at 19.

Garcia v. San Antonio Metro. Transit Auth.,[112] the Court held that state authority in performing a traditional state function would not exempt the state from Commerce Clause regulation.[113] The *Garcia* majority noted that the federal government structure has facilitated state representation in Congress and that such a structure has sufficiently limited Congressional actions.[114]

5. Conclusion on Seminole

The *Seminole* majority disregarded part of the history and tradition of sovereign immunity and the Eleventh Amendment. The Seminole Tribe sought prospective relief from a government official who violated a federal statute and claimed a remedy created by Congress. The precise language of the Constitution, the supremacy of the national government, the desire for the Court to follow Congressional intent, and the need for accountability for a government official engaging in conduct prohibited by a federal law should have convinced the Court to accept Congress' power to abrogate state sovereign immunity under the Commerce Clause. Since Congress has represented state interests more than any other branch of the federal government, the Supreme Court should attempt to create a balance between separation of powers and states' rights instead of ignoring separation of powers to act mostly for states' rights interests. In addition, the Supreme Court should remember that sovereign immunity originated in England not to protect local governments from the King but to protect government functions.

The *Seminole* majority first should have conducted a government functions analysis before analyzing state sovereign immunity in the context of federalism and separation of powers. Whether state sovereign immunity or federal sovereign immunity is at stake, a government functions analysis determines if there is a need for such protection in the first place.

IV. CONCLUSION: PROPOSED CHANGES TO IGRA

A. Congressional Proposals Thus Far Have Not Provided for Repair

Although H.R. 1512[115] and S. 487[116] were introduced prior to the *Seminole* decision, subsequent proposals have been even less favorable toward Indian tribes.[117] As discussed below, the language of H.R. 1512 and S. 487 conflicted with the restricted state position towards Indian gaming established by the Supreme Court in *Cabazon* and preserved in IGRA. Additionally, these two bills which composed the Fair Indian Gaming Act attempted to put more power in the hands of the states than IGRA.

Section two of the proposed Fair Indian Gaming Act suggested three changes to the compact negotiation and approval process outlined in IGRA.[118] First, the bill rec-

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112. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

113. *Id.* at 555-57.

114. *Id.* at 556. See also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled by* Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996), and *Parden v. Terminal Railway*, 377 U.S. 184 (1964), which both support the conclusion that the Commerce Clause limits state sovereignty.

115. H.R. 1512, 104th Cong. (1995).

116. S. 487, 104th Cong. (1995).

117. Telephone Interview with Karen Funk, Legislative Affairs Specialist at Hobbs, Straus, Dean & Walker (a law firm specializing in American Indian matters) (February 21, 1997).

118. H.R. 1512, 104th Cong. (1995).

ommended that the burden of proof shift from the state having to prove it negotiated in good faith over to the tribe having to prove a state negotiated in bad faith.[119] Second, the bill prevents tribes from presenting certain evidence of state failure to negotiate in good faith.[120] The third change proposed, "Section 11(d)(3)(B) of the Indian Gaming Regulatory Act (25 U.S.C. 2710(d)(3)(B)) is amended by striking 'only when' and inserting 'only after such compact is approved by the legislature and the Governor of the State and'."[121] Essentially, this modification would ensure that state approval preceded the actual commencement of gaming. Section three of the bill, Gaming on After-Acquired Lands, would greatly decrease the Secretary of Interior's authority to take lands into trust and thus would transfer more control over those matters to state governors and legislatures.[122] These subsequent proposed changes to IGRA would have only weakened tribal sovereignty further than the damage inflicted by the *Seminole* decision.

B. What Congress and Courts Should Do

This Note proposes three ways to repair the delicate balance reached in IGRA but disrupted by the Supreme Court in *Seminole*. First, IGRA could be repealed and Indian Gaming could fall back within the plenary power of the federal government in accordance with *Cabazon*.[123] Although an attractive remedy, particularly for Indian tribes, this solution is improbable because of Congress' desire to keep the states involved.

Second, Congress could redraft IGRA and require that both states and tribes waive their sovereign immunity and thus be amenable to suit in federal courts before the two sides begin any negotiations. If states refused to waive their sovereign immunity, they would be left out of the process. If tribes refused to waive their sovereign immunity, they would be stuck with a lengthier process and more administrative hoops to jump through. Tribes would be susceptible to the whims of particular administrations with varying perceptions of Indian gaming. Another way in which Congress could redraft IGRA would be to add a specific clause stating that tribes have an *Ex parte Young* remedy against the states and states have an *Ex parte Young* remedy against tribes.

Finally, in lieu of Congress redrafting IGRA, the courts could repair the damage in a future case and properly acknowledge *Ex parte Young* as the appropriate remedy to this piece of legislation. Also, the Court could overrule part of *Seminole* and recognize that Congress possesses the authority to abrogate state sovereign immunity when it enacts legislation pursuant to the Commerce Clause. All of these remedies maintain and preserve the delicate balance between federal, state, and tribal interests.

*Nancy J. Bride**

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119. H.R. 1512 § 2(a).
120. H.R. 1512 § 2(b)(3).
121. H.R. 1512 § 2(c).
122. H.R. 1512 § 3.
123. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

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